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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

M.D. et al.

Petitioners,

v.

THE SUPERIOR COURT OF KERN  
COUNTY,

Respondent;

KERN COUNTY DEPARTMENT OF  
HUMAN SERVICES,

Real Party in Interest.

F059029

(Super. Ct. Nos. JD115525 & JD112371)

**OPINION**

**THE COURT\***

ORIGINAL PROCEEDINGS; petition for extraordinary writ review. Robert J. Anspach, Judge.

M.D. and S.D., in pro. per., for Petitioners.

No appearance for Respondent.

Theresa A. Goldner, County Counsel, and Susan M. Gill, Deputy County Counsel,  
for Real Party in Interest.

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\*Before Levy, Acting P.J., Cornell, J., and Poochigian, J.

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Petitioners are the maternal grandparents of two dependent children (the C. children) whom respondent Kern County Superior Court freed for adoption (Welf. & Inst. Code, § 366.26, subd. (c))<sup>1</sup> in February 2009. The grandparents were considered the children's prospective adoptive parents in that they had cared for the C. children off and on since 2007 and had taken steps towards adopting them.

In October 2009, real party in interest Kern County Department of Human Services (the department) removed the C. children from their grandparents' care after learning the maternal grandmother hit another grandchild and reportedly often hit the children in her care. The grandparents formally objected to the C. children's removal and requested the court's review. The superior court denied the grandparents' objection in November 2009 and found the removal was in the C. children's best interests.

The grandparents seek writ review (§ 366.28) of the superior court's decision. On review, we deny the grandparents' petition.

### **FACTUAL AND PROCEDURAL SUMMARY**

The C. children were born between 2006 and 2007 to parents whose substance abuse and domestic violence rendered them unable to provide adequate care. In January 2007, the superior court adjudged the older of the two children a dependent and removed her from parental custody. In the meantime, she had been placed with the grandparents. Although the younger of the two was immediately detained upon his birth later in 2007, the court later placed him, along with the older child, with their father. The father, at the time, had made significant progress in court-ordered services. Eventually, however, the father's conduct placed the C. children at such a risk of harm that they were once again detained in July 2008 and placed with the grandparents. The grandparents already had

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code unless otherwise noted.

living with them the C. children's older half brother S. in a long-term foster care placement. All three children remained in the grandparents' home thereafter until their removal in October 2009. Meanwhile in February 2009, the superior court found it was likely the C. children would be adopted and terminated parental rights.

In late October 2009, Adoptions Social Service Worker, Daniel Rubiaco, gave notice of the C. children's emergency removal. In the "Notice of Emergency Removal," Rubiaco alleged the county's adoption agency had removed the C. children from the grandparents' home because of an immediate risk of harm, specifically:

“[the grandmother] stated that she used physical discipline on a foster child [S.] who falls under the jurisdiction of the court. The child subsequently suffered a ‘busted lip.’ [The grandmother] also stated that ‘if [she] would have caught him he would have bruises all over his body.’”

The grandparents in turn filed a written “Objection to Removal.” In it, they alleged the C. children should not have been removed because they had become a loving family since their placement in the grandparents' home and the grandparents were committed to adopting the C. children. In an attachment to their objection, the grandparents also detailed medical care they had secured over the years for a medical problem the older of the C. children had as well as the grandparents' efforts to maintain a relationship between the C. children and another sibling of theirs who did not live in the grandparents' home. The grandparents, however, did not refute the statements attributed to the grandmother in the county adoption agency's notice of emergency removal.

The superior court set the matter for hearing in early November 2009. The day before the hearing the department submitted a written report regarding its investigation of a referral made on October 23, 2009, alleging physical abuse and general neglect in the grandparents' home. The report set forth the following chronology.

On October 23, 2009, a Social Service Supervisor with the department visited S. (the C. children's older half sibling) and the grandmother in the grandparents' home.

Shortly after the supervisor entered the home, the grandmother reported that “she and [S.] got into it last night.” According to the grandmother, “[S.] was calling her a liar in front of the other kids and she can’t have that. She stated ‘I popped him in the mouth and if the table and chairs weren’t in the way he would’ve had bruises all over him because I was coming after him with the broom.’” In the grandmother’s opinion, she could not have S. calling her a liar and making her look bad in front of the other children. Even though S. was in her foster care, the grandmother was not going to raise him any differently than she raised her own children. “[I]f this means you have to remove all the kids then you do what you have to.”

The supervisor took S. for a ride in order to talk with him. During the trip, S. reported he and his grandmother had argued the night before over a game and to which foster child or children in the home it belonged. As they kept arguing, the grandmother got mad and hit him in the mouth. He also confirmed that she came after him with a broom. S. reported that his lip did bleed and the incident was scary. The supervisor did not observe any bruising on S.’s lip.

S. also reported the grandmother had hit him before and hit everyone, but mostly him and sometimes another child. When asked if the grandmother hit “the little kids,” S. said she spanked them when they were bad.

That same day, another social service worker, Christine Garza, interviewed two school-aged foster children who also lived in the grandparents’ home. In separate interviews conducted at their elementary school, each child confirmed the grandmother hit S. the night before and that this was not the first time she had hit him. The younger of the two added that S. was hit a lot and they all got spanked and hit in the home. S. got hit the most. The older of the two denied ever being hit by the grandmother. However, that child had seen the grandmother hit other kids in the home. Neither of the children who were interviewed would be sad to leave the home.

Garza also apparently spoke with the grandmother on or around October 23, 2009. The grandmother said “she popped [S.] in the mouth.” All of the dependent children in the grandparents’ care, including the C. children, were apparently removed that same day.

In an October 26th conversation with adoption social service worker Rubiacco, the grandmother claimed that on October 22, she wanted to warn S. and tell him to stop so she swung the broom handle around and tapped the back of a chair. As S. called her a liar, she stated she walked over to him and with the palm of her open hand “tapped” him twice on his lip as she said she was not a liar. She denied that S. had a busted lip, but if he did, it would have occurred when he put his head down on the table the third time she was going to tap him on his lips.

The grandmother also denied saying on the 23rd that “if I would have caught [him] ([S.]) he would have bruises all over his body.” She claimed instead that what she said was “luckily the table and the chair were there otherwise [S.] could have been bruised.” She said that because she knew how easily he bruised and even the “tap, tap” of the back of the chair could have bruised him.

The grandmother had another conversation with social service worker Garza on October 27. The grandmother stated “things got blown up and things were stated that were not true.” She admitted previously telling Garza that she popped S. in the mouth but it was an open handed pop in the mouth to get him to shut up. She popped him twice and on the third time he moved his head so she ended up hitting him on the forehead. She also claimed it was her practice to tap the chair with a broom as a warning to the children.

The grandmother admitted she knew that any type of physical punishment was not allowed on foster children. She also denied being too stressed to care for all the children in her home.

The following day, social service worker Garza spoke separately with S. as well as the other children she previously interviewed on October 23rd. During these interviews, she asked each child if he or she wanted to return to the grandparents' home. None of them did.

The C. children were too young to interview.

In the analysis portion of its report, the department concluded that, based on the statements of the grandmother, S., and the two foster children Garza interviewed, the grandmother had a history of using corporal punishment on several children in the home and it would not be in the best interest of the C. children to be returned to the grandparents' care.

The court conducted a November 4th hearing on the grandparents' objection. It stated it had looked at the grandparents' paperwork in support of reunification and the department's report. The court asked the grandparents whether there was anything else that they needed to tell the court. The grandparents did not verbally respond. The court then asked "[p]retty much put it all there?" to which the grandparents again did not verbally reply. The court said "Okay" and denied the grandparents' "Objection to Removal." The court also found removal was in the best interest of the minors.

## **DISCUSSION**

In their writ petition, the grandparents ask that the C. children be returned to the grandparents' home because the allegations of physical abuse and general neglect were determined to be "unfounded." The grandparents have attached to their petition a copy of a December 3, 2009, letter from a social worker with the department and addressed to the maternal grandmother. The letter purports to inform the maternal grandmother that "the disposition of our recent investigation of referral(s) received on 10-23-09 are as follows: [¶] Physical Abuse has been determined to be: [¶] Unfounded ... [¶] General Neglect

has been determined to be: [¶] Unfounded.” The grandparents also volunteer that each of them is now participating in parenting classes.

What the grandparents fail to allege is what error, if any, the court committed in denying their objection to the C. children’s removal. In so doing, they overlook their burden of affirmatively establishing prejudicial error on the record that was before the superior court when it denied the grandparents’ objection. (*In re Zeth S.* (2003) 31 Cal.4th 396, 405; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

The December 3rd letter was not before the superior court, indeed it apparently had not even been written, when the court conducted its November hearing on the grandparents’ objection. Similarly, the grandparents did not present evidence of their participation in parenting classes for the court’s consideration. Consequently, we may not consider such post-judgment evidence, either the December letter or the grandparents’ recent efforts, in evaluating whether the superior court erred. (*In re Zeth S., supra*, 31 Cal.4th at pp. 400 & 407.)

Even so, we add the following observation. A department determination that the October 23, 2009, referral for physical abuse and general neglect was unfounded did not undermine the court’s finding that removal of the C. children was in their best interests. The evidence remains that the grandmother had a history of using corporal punishment on several children in the home even though she knew that was prohibited. Assuming such conduct did not constitute physical abuse in the department’s estimation, the court nevertheless could properly find that removal was in the C. children’s best interests.

### **DISPOSITION**

The petition is denied. This opinion is final forthwith as to this court.